TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 709.

AUGUST BERGEMANN, APPELLANT,

vs.

EDMUND A. BACKER, SHERIFF OF THE COUNTY OF MORRIS, STATE OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED MAY 24, 1894.

(15,593.)

(15,593.)

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1895.

1 In the Circuit Court of the United States, District of New Jersey.

AUGUST BERGEMANN, Plaintiff and Appellant,
and
EDMUND A. BACKER, Defendant and Appellee.

The above-named plaintiff, August Bergemann, considering himself aggrieved by the judgment entered on this twenty-fourth day of April, in the year eighteen hundred and ninety-four, in the above-entitled proceedings, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this appeal be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM D. DALY,
Attorney for Plaintiff and Appellant.

And now, to wit, on the twenty-fourth day of April, A. D. 1894, this appeal is taken and allowed as prayed for, by and in pursuance of the statute in such case made and provided.

EDW. T. GREEN, *J.*

Endorsed: United States circuit court, district of New Jersey. August Bergemann *vs.* Edmund A. Backer. Petition and allowance of appeal. William D. Daly, sol'r for petitioner. Filed Apr. 24, 1894.

2 By the Honorable Edward T. Green, judge of the district court of the United States for the district of New Jersey and *ex officio* a judge of the circuit court of the United States in the third circuit in and for the district of New Jersey.

To Edmund A. Backer, sheriff of the county of Morris, State of New Jersey:

Whereas August Bergemann has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the district of New Jersey, made in favor of you, the said Edmund A. Backer, sheriff of the county of Morris, State of New Jersey, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the twenty-fourth day of May next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton, in the district of New Jersey, in the third circuit, the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and ninety-four.

EDW. T. GREEN, *Judge.*

STATE OF NEW JERSEY, } ss:
County of Morris, }

Be it remembered that on this third day of May, anno Domini eighteen hundred and ninety-four, before me, Daniel S. Voorhees, a notary public for the State of New Jersey, residing in Morristown, in said Morris county, duly commissioned and sworn and by law authorized to administer oaths and affirmations, personally appeared Thomas J. O'Brien, of said Morristown, and who, being by me duly sworn, did depose and say that he served the above citation upon the said Edmund A. Backer, sheriff of said Morris county, at his office, at Morristown aforesaid, upon the twenty-fifth day of April, eighteen hundred and ninety-four, by showing and reading the same to him, the said Edmund A. Backer, and giving him a true copy thereof; and deponent further deposes and saith that he did at the time of serving said citation as aforesaid serve upon
3 and leave with said Edmund A. Backer a true copy of the petition and allowance of appeal in said matter; and further deponent saith not.

THOMAS J. O'BRIEN.

Seal Daniel S. Voorhees, Notary Public, Morristown, New Jersey.

In testimony whereof I have hereunto set my hand and official seal the day and year first above written.

DANIEL S. VOORHEES,
Notary Public, of New Jersey.

[Endorsed:] United States Supreme Court. August Bergemann, appellant, *vs.* Edmund A. Backer, sheriff. Citation.

4 In the Supreme Court of the United States, October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-four.

AUGUST BERGEMANN, Appellant, }
vs.
EDMUND A. BACKER, Defendant and Appellee. }

Afterwards, to wit, on the twenty-fourth day of May, in the year eighteen hundred and ninety-four, in this term, before justices of the Supreme Court of the United States, at the Capitol, in Washington, District of Columbia, comes the said August Bergemann, by his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, in refusing to issue the writ of *habeas corpus* as prayed for—

Whereas by the law of the land the judgment ought to have been given for the plaintiff against the said defendant, and that the said plaintiff prays the judgment aforesaid may be reversed, amended, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment.

WILLIAM D. DALY,
Attorney for Plaintiff in Error.

Endorsed: United States Supreme Court. August Bergemann *es.* Edmund A. Backer. Assignment of error. William D. Daly, solicitor for appellant. Filed Apr. 4, 1894.

5 To the honorable the judges of the circuit court of the United States:

The petitioner, August Bergemann, late of the township of Passaic, in the county of Morris and State of New Jersey, respectfully shows that the petitioner is now in the common jail of the county of Morris, in the custody of Edmund A. Backer, Esq., sheriff of the county of Morris and State of New Jersey, at Morristown, in the said county of Morris.

That your petitioner is a citizen of the United States of America; that he was convicted of the crime of murder in the first degree in the court of oyer and terminer of the county of Morris, State of New Jersey; that he was so convicted of murder of the first degree on the fifteenth day of February, in the year eighteen hundred and ninety-four; that on the fifteenth day of February your petitioner was sentenced to be hung at Morristown on the twenty-ninth day of March, eighteen hundred and ninety-four; that by a reprieve granted by the governor of the State of New Jersey the time of the execution of your petitioner was extended to the twenty-sixth day of April, in the year eighteen hundred and ninety-four; that a death warrant has been issued for the execution of your petitioner on said day and he is now in the custody of the sheriff awaiting the time of his execution.

And your petitioner further shows that he was indicted at the January term, eighteen hundred and ninety-four, at the court of oyer and terminer of Morris county, by a grand jury summoned by the sheriff of the county of Morris; that your petitioner
6 was charged upon his indictment about the twenty-fifth day of January, eighteen hundred and ninety-four, to which said indictment your petitioner pleaded not guilty; that your petitioner was, upon the thirteenth day of February, in the year of our Lord eighteen hundred and ninety-four, put on trial on said indictment in said court, and as a result of said trial was found, by the verdict of the jury therein sitting, guilty of murder in the first degree, and by said court sentenced to be hanged upon the twenty-ninth day of March, in the year of our Lord eighteen hundred and ninety-four, as aforesaid. And your petitioner further submits that he has applied to all the courts of the said State of New Jersey having power in such cases in them vested to relieve him from and stay aforesaid execution, and has been by them denied relief, and has applied for a writ of error to review said judgment and has been denied such writ.

And your petitioner further shows that the said indictment upon which he was charged as aforesaid merely charged this petitioner with the crime of murder of the second degree and not of the crime of murder of the first degree, of which he was convicted as aforesaid.

And your petitioner further shows that he never was charged

with the crime of murder of the first degree, nor was he informed thereof of said crime of murder of the first degree, by any indictment of the grand jury of the said county of Morris, as by the Constitution and laws of the land he should have been so charged before he could have been convicted thereof, a copy of
7 which indictment is hereto annexed.

And your petitioner further shows that he ought not to have been sentenced to death, as the said court was without jurisdiction in the premises and could not have imposed said judgment under said indictment according to the Constitution and law of the land.

And your petitioner further shows that the said conviction and the judgment of said court thereon was in violation of the fourteenth amendment of the Constitution of the United States, in that he was denied the equal protection of the law as contemplated by said amendment and the sixth amendment, which requires that the defendant shall be informed of the nature and cause of the accusation made against him.

Your petitioner therefore prays that the court will grant him a writ of *habeas corpus*, according to the statute in such case made and provided, and will enquire into the cause of the said imprisonment; will vacate and set aside the judgment and sentence of said court and stay the execution of the same, and that your petitioner may be discharged from said imprisonment.

And your petitioner will ever pray, &c.

AUGUST BERGEMAN.
By WM. D. DALY, *His Attorney.*

8 STATE OF NEW JERSEY, } ss.:
County of Morris, }

August Bergeman, being duly sworn, on his oath saith that the matters and things stated in the foregoing petition are true to the best of his knowledge and belief.

AUGUST BERGEMANN.

Sworn to and subscribed before me this twenty-third day of April, A. D. 1894.

JOHN H. CONDON,
Notary Public, of New Jersey.

STATE OF NEW JERSEY, } ss.:
Morris County, }

I, Elias B. Mott, clerk of the county of Morris, do hereby certify that John H. Condon, by whom the foregoing affidavit was
[L. S.] taken and certified, was at the time of taking such affidavit one of the notaries public in and *in and* for said county and State, residing in said county, duly commissioned and sworn and authorized by the laws of the State of New Jersey to take the same, and that I am well acquainted with the handwriting of such notary and verily believe that the signature to such certificate is genuine; and I further certify that such affidavit purports to be taken in all respects as required by the laws of said State.

In testimony whereof I have hereunto set my hand and affixed the seal of the said county, at Morristown, this 24 day of April, A. D. 1894.

ELIAS B. MOTT, *Clerk.*

Morris Oyer and Terminer and General Jail Delivery, January Term, 1894.

MORRIS COUNTY, *To wit:*

The grand inquest for the State of New Jersey and for the body of the county of Morris upon their oath present that August Bergemann, otherwise called Charlie Bergemann, late of the township of Passaic, in the said county of Morris, on the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms, at the township of Passaic aforesaid, in the county of Morris aforesaid, and within the jurisdiction of this court, one Julius Bergemann, then and there being in the peace of God and of this State, did wilfully, feloniously, and of his malice aforethought kill and murder, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

JOSHUA S. SALMON,
Prosecutor of the Pleas.

Endorsed: Morris oyer and terminer, Jan. term, A. D. 1894. The State *vs.* August Bergemann, alias Charlie Bergemann. Indictment for murder. Joshua S. Salmon, prosecutor of the pleas. A true bill. Melvin S. Condit, foreman. Plea, not guilty, Jan. 26, '94. Trial, Feb'y 13, '94. Filed in court of oyer & terminer Jan. 26, 1894. Elias B. Mott, clerk.

STATE OF NEW JERSEY, } ss.:
County of Morris, }

I, Elias B. Mott, clerk of the county of Morris and also clerk of the court of oyer and terminer and general jail delivery holden in and for said county, do hereby certify that the foregoing is a true copy of an indictment lately found in said court against August Bergemann, otherwise called Charlie Bergemann, for murder, with the endorsement thereon, made as fully as the same remains on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Morristown, this eighth day of February, A. D. eighteen hundred and ninety-four.

[L. S.]

ELIAS B. MOTT, *Clerk.*

Endorsed: The writ in this case is refused because in my opinion it appears from the petition that the petitioner is not entitled thereto.

Dated April 24, 1894.

EDW. T. GREEN, *J.*

Filed Apr. 24, 1894.

11 UNITED STATES OF AMERICA, } ss:
District of New Jersey. }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of August Bergemann *vs.* Edmund A. Backer as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Trenton, in said district, this twenty second day of May, A. D. 1894.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 15,563. New Jersey C. C. U. S. Term No., 709. August Bergemann, appellant, *vs.* Edmund A. Backer, sheriff of the county of Morris, State of New Jersey. Filed May 24th, 1894.

157-655

Office Supreme Court, U. S.
FILED.
MAR 5 1895
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1894.

NO. 709.

AUGUST BERGEMAN,
Appellant.

vs.

EDMUND A. BACKER,
Appellee.

ON HABEAS CORPUS.

APPELLANT'S BRIEF.

WILLIAM D. DALY,
THOMAS J. O'BRIEN,
JAMES J. FUREY,
Counsel for Appellant.

Summit Record Print, Summit, N. J.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1894.

No. 709.

AUGUST BERGEMAN, Appellant, *vs.* EDMUND A. BACKER, Sheriff of the County of Morris in the State of New Jersey, Appellee.	An Appeal upon Habeas Corpus. Appellants brief.

State of the Case.

Appellant was indicted for the crime of murder at the January Term, 1894, by the Grand Inquest of the County of Morris, in the State of New Jersey. He pleaded not guilty and on February 14, 1894 was placed on trial upon said indictment. The victim was the brother of appellant. The crime was com-

mitted on January 19th A. D. 1894. The appellant was sworn as a witness in his own behalf and testified that the killing resulted from anger, and not from any premeditation. Notwithstanding that the indictment did not allege premeditation affirmatively as called for by the statute, the learned judge, who presided at the trial, (the court being the court of oyer and terminer and general jail delivery of said County) informed and instructed the jury that it was their province to decide what was the degree of guilt, either the first or second degree; the first degree carrying with it the death penalty, the second degree imprisonment for twenty years.

The said presiding judge further in his charge, instructed the jury that murder had been committed by the defendant. When the jury retired to make up their verdict, counsel for appellant entered a general exception and objection both to the charge of the judge and to the proceedings of the whole trial. A verdict of guilty of murder of the first degree was rendered, and thereupon forthwith appellant was sentenced to death by the same judge who presided at the trial.

Appellant then endeavored to obtain a writ of error to have reviewed in the Supreme Court of that state the exceptions taken to the charge of the judge to the jury, and to have determined whether such charge, was not a gross abuse of discretion, and tending to unduly inflame and bias the minds of the jury, to the injury of the defendant and that such charge produced such a result. Further to have the opinion and judgment of said appellate court as to the validity of said indictment in form and substance, and whether or not thereunder any crime exceeding murder of the second degree could be found.

This writ of error has been peremptorily denied by the State of New Jersey through its Chancellor, and to whom such application has been made. He

assumed the right and exclusive authority to hear said appellant and to deny the same.

Appellant then on such refusal applied for the writ of Habeas Corpus, for the refusal of which, this proceeding by way of appeal therefrom is brought.

This brings us to the consideration of the doctrine of law that,

"All proceedings of inferior Courts which conclusively affect the rights or property of persons ought to be subject to the revision or correction of a higher tribunal."

6 John's (N. Y.) page 389.

Appellant however is denied such a privilege by the State of New Jersey through its Chancellor, who assumes the right and exclusive authority to say whether or not a writ of error should issue. And application therefor having been made by appellant was by the Chancellor denied.

Is such refusal of the Chancellor a ministerial or judicial function? If ministerial, it is insisted that appellant cannot be deprived of the judgment of the Supreme Court of this State for such writ. If judicial it must be by force of some legislation of New Jersey for the reason that this Country and every State thereof having a republican form of Government, a person to be deprived of life or property must receive judicial judgment and not an individual opinion, ministerial in its character.

Counsel for appellant contend that it is a principle of elementary law, that every person should have the right to such judicial judgment from the highest Court of the State when he seeks such relief, and to deny him that remedy it must affirmatively appear that the reason for such refusal is justified by the law of the land. This brings forth a criticism of the law under which said Chancellor bases his jurisdiction and upon which law solely he re-

fused to grant such writ to appellant. "That writs of error in all criminal cases not punishable with death shall be considered as writs of right and issue of course; and in all criminal cases, punishable with death writs of error shall be considered as writs of grace, and shall not issue but by order of the Chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the Attorney General or the prosecutor for the State"

Allison's Laws of N. J. page 186.

This act was first passed by the Legislature of New Jersey under its first constitution, which constitution was adopted at Burlington, N. J., July, 2, 1776, in and by the provisions of said constitution under the 22nd section thereof the Common Law of England as well as so much of the Statute Law as had theretofore been practiced in the Colony should remain in force until ordered by a future law of the legislature etc..

Allison's Laws of New Jersey page 7.

Said act was passed March 6, 1795.

Ibid, page 126.

It is contended that the reason for such enactment was that corruption of blood and forfeiture of estate then followed conviction in a criminal capital case and that the legislature on the eighteenth of March, 1796, by direct enactment abrogated attainder in capital cases in the State of New Jersey.

Ibid, page 263.

In reason and authority on the passage of the last named act the reason for refusing writs of error in criminal cases ceased.

Nevertheless under the constitution of June 29, 1844, and amended on September 7, 1875, we find re-enacted the Statute vesting in the Chancellor the powers first above set out.

Nixon's Dig. of N. J. page 221.

Rev. of N. J. page 283.

But on March 12, 1878, the legislature of New Jersey by virtue of its powers as first shown in said statute and under which the Chancellor theretofore assumed the jurisdiction amended said statute as follows, "Writs of error in all criminal cases shall be considered as writs of right and issue of course, but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the Court of Errors and Appeals alone and shall be heard and determined at the term of said Court next after the judgment of the Court below, unless for good reasons the Court of Errors and Appeals shall continue the cause to any subsequent term.

Supp to Rev. of N. J. page 210.

This last act yet remains in force and operative, *never* having been repealed, nevertheless although appellant has sought its benefit and endeavored to have his said cause brought before said Court of Errors and Appeals, he has been denied such application.

This brings us further into the inquiry when the statute making writs of error writs of grace was first passed did the State of New Jersey in its judiciary department of government have a Court of Errors and Appeals? Counsel for appellant contends in the negative.

If in the first instance the legislature had the right to vest such authority in the Chancellor, with a reservation, under the constitution, to amend the same

in the future what right did they transgress in changing such law and vesting such right in an absolute Court who would have to hear and determine all questions reserved by the defendant, and not submit such a power to the discretion of an individual though he be a Chancellor?

What is Discretion? "The discretion of a judge is said to be the law of tyrants; it is always unknown, it is different in different men, it is casual and depends upon constitution, temper, and passion. In the best it is often caprice; in the worst, it is every vice, folly and passion, to which human nature is liable."

Bouvier L. D. title "Discretion."

The Supreme Court of New Jersey is the only forum that can declare a statute to be void.

State vs. Parkhurst, 4 Hal's. 427.

Said Court has never acted under the amended statute aforesaid passed on March 12, 1878.

It is conceded that at the March Term 1885, of said Court of Errors and Appeals that it declined to accept jurisdiction under the statute passed as aforesaid on March 12, 1878 and dismissed a writ brought thereunder.

State vs. Entries, 18 Vroom, 149.

Since said decison the Chancellor assumes the exclusive right and authority to determine whether or not a writ of error shall be allowed in a capital case notwithstanding the repeal of the attainder statute of 1796.

The reason for the rigid rule of the Common Law was that upon conviction a writ of attainder followed, whereby a forfeiture was created and after the death, all the lands and tenements in fee simple (but not those in tail) went to the Crown, for the space

of a year and a day giving the King permission to commit therein what waste he pleased.

4 Blackstone page 385.

At Common Law the purpose of the writ was to reverse the attainder and not the conviction, and were thus only allowed *ex gratia* and not without express warrant under the King's sign-manual, or at least, by the consent of the Attorney General, they could rarely be brought by the party himself, especially where he was attainted for an offence against the State; but it was a writ of right to the heir or executor, after the death of the convict, to be brought in more favorable times, which the Law then considered to be a consolation to the family of the convict.

4 Blackstone page 392.

Such is the position now taken by the State of New Jersey, through its Chancellor, in denying such writ of error to appellant, although attainder ceased to exist since 1796, by an express act of the legislature and such doctrine of the Common Law by the British Parliament was abrogated in 1870, by the 33d and 34th Vic. chapter 23.

And following in that line of legislation, the legislature of New Jersey passed the act of 1878, in consonance with the dictates of humanity, and pursuant to the maxim, "That our law be grounded upon the law of Nature, three things do flow therefrom, preservation of life, natural liberty, which every beast and bird seeketh and affecteth Naturally etc."

Bacon's Arg. Case of the Postnati of Scotland. Works iv. page 345.

So the case is now squarely presented that the legislature of a State permits a writ of error in all cases while a subordinate branch of its judiciary declines

to accept a jurisdiction thereunder, and the Chancellor who is the president of such Court of Appeals, and also a member of the Court of Pardons, peremptorily refuses such writ thereby denying the convict access to said Court and if recourse be had to the Court of Pardons to mitigate such punishment, he is met by a member thereof to wit, said Chancellor, who already has given an opinion prejudicial to the postulant, in denying to him such writ or error. This clearly raised a Federal question on the record within the terms of the fourteenth amendment in the State of New Jersey denying to appellant within its jurisdiction the equal protection of the laws and seeking to deprive him of such writ of error as also his life without due process of law.

Counsel for appellant contend that another Federal question is presented on the record in the State Court viz:

That in said indictment he was not fully informed of the nature and cause of the accusation, pursuant to the Constitution of New Jersey.

This insistment is made on the ground that the indictment fails to charge the crime to have been done with premeditation.

The indictment is in the Statutory form, and is more particularly recited in the Transcript filed in this cause and is known as the 68th Section of the Crimes Act. "All murder which shall be perpetrated by means of poison or by lying in wait or by any other kind of wilful, *deliberate* and *premeditated* killing etc., shall be deemed murder in the first degree." All other murder shall be murder of the second degree.

The accused must be apprised of every ingredient of the crime of which he stands charged.

U. S. vs. Cruikshank

92 U. S. 542.

Where technical words and phrases are used in in a Statute describing an offence the indictment must follow the Statute closely or it will be defective.

State vs. Yore 34 N. H. 510.

The indictment therefore being silent as to the fact of charging *premeditation* assuming the guilt of defendant no higher degree than murder of the second degree could be found.

The word premeditation in the Statute is an *essential ingredient* and became operative, the Statute being amendatory of the Common Law under the Statute 2, 23 Hen. VIII. CH. 1x3.

Prior to that Statutes all homicides were then punishable with death but clergy was allowed to all.

But that statute in its express terms took away benefit of clergy where the homicide was committed wilfully and of malice aforethought, and so continued to be the law of New Jersey until March 8, 1796, when the benefit of clergy was repealed.

Laws of N. J., (First Edition), 221.

Premeditation must then be alleged in the indictments, to the end, that defendant might have known that his life was in jeopardy, if the jury had a right to find premeditation by their verdict.

The indictment therefore is defective, and repugnant not only to the law of New Jersey, but the law of the United States.

As to the query: What supervisory authority has the United States Constitution over the State?

The Constitution of the United States, and every article and clause in it, is a part of the law of every State in the Union, and is a paramount law.

And State constitutions and laws are a necessary part of the Federal System.

Hon. Thos. M. Cooley in his article "Written and Prescriptive Constitutions." 23 Am. Law Rev. 314.

In favor of life, great strictness has at all times been observed in every part of an indictment.

Chase's Blackstone, 1035.

The Counsel took exception to the charge of the judge and the proceedings of the trial.

The nature of the provocation in causing the killing and its sufficiency as proved in the trial is a question of law.

Roscoe's Cr. Ev. 965.

It is therefore manifest that attainder and forfeiture having been abolished by the Statutes of N. J. in 1796—the re-enactment of the Statute thereafter concerning writs of error gave no authority to the Chancellor to either refuse or permit a writ of error unless it be asserted that under the Common Law upon verdict the prisoner was then really dead.

4 Block 385.

But at Common Law the prisoner did not have the benefit of counsel which rule was changed by the Constitution of New Jersey. And as by the practice when sentence of death under the Common Law was given, the prisoner was permitted only 48 hours of life. The Conclusion is therefore irresistible that the office of the writ of error was to vacate the attainder and not the sentence.

See 25 Geo. 11 ch. 27.

Counsel therefore being permitted for the prisoner, as in this case the exception taken by such counsel should be reviewable in the highest Court of that State and its denial is not due process of law.

Counsel for appellant do not contend that under this writ of habeas corpus it shall perform the

functions of a court of error, to review the exceptions had and taken on said trial, but submit that inasmuch as the legislature of New Jersey has given appellant such a claim and demand to such writ, to bring up all of said cause to the Court of Errors and Appeals of said State, and its denial by virtue of such decision of State in Entries 18 Vr. 140, and the subsequent refusal therefor by said Chancellor, by the order of this court the appellant should be remanded and such execution of appellant be stayed, to give appellant an opportunity to have the legality of statute under which the Chancellor acted, determined by writ of error from the Supreme Court of the United States, and that the statute under which said Chancellor denied said writ to be adjudged repugnant to the constitution and laws of the land, and that said intended execution of appellant is not by due process of law.

William D. Daly

Counsel for Appellant

157-633
157-655

Office Supreme Court, U. S.
FILED.
MAR 4 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1894.

NO. 709.

AUGUST BERGEMANN,
Appellant,
AGST.
EDMUND A. BACKER,
Sheriff,
Appellee.

Brief for Appellee.

Appeal from the Circuit Court of the U. S. for the District of New Jersey.

J. S. SALMON,
Attorney for Appellee.

SUPREME COURT

OF THE UNITED STATES.

In re.

AUGUST BERGEMANN,

Plaintiff and Appellant.

vs.

EDMUND A. BACKER,

SHERIFF, &C.,

Defendant and Appellee.

Brief for Appellee.

J. S. SALMON,
Attorney for Appellee.

At the January Term, A. D., eighteen hundred and ninety-four of the Court of Oyer and Terminer and General Jail Delivery, of the County of Morris and State of New Jersey, August Bergemann was

indicted for murder; and upon the trial of said indictment held on the thirteenth and fourteenth of the month of February following, he was convicted of murder in the first degree, and was on the fifteenth of said month of February sentenced to be executed on the twenty-ninth day of the following March.

Before the last mentioned date a reprieve was granted by the Governor to the twenty-sixth day of April in order to give opportunity to apply to the Court of Pardons in behalf of Bergemann. The Court of Pardons having refused to interfere with the sentence pronounced, proceedings were taken in the United States Court, which are now before the United States Supreme Court on appeal from the judgment rendered in the Circuit Court of the United States, District of New Jersey.

The Appellant's insistment as appears by his petition filed in this cause is "that the said indictment upon which he was charged as aforesaid "merely charged the petitioner with the crime of "murder of the second degree and not of the crime "of murder of the first degree of which he was "convicted as aforesaid," and further "that the "said conviction and the judgment of said Court "thereon was in violation of the 14th amendment "of the Constitution of the United States in that "he was denied the equal protection of the law as "contemplated by said amendment, and the 6th "amendment which requires that the defendant "shall be informed of the nature and cause of the "accusation made against him."

The following is the 68th section of the New Jersey Crimes Act, viz.: "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy,

robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree."—Rev. Sts. of N. J., pg. 239, sec. 68. *This section is in the Revision of the Crimes Act of 1846.*

Section 45 of the New Jersey Criminal Procedure Act is as follows, viz.: "In any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did wilfully, feloniously and of his malice aforethought kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." Rev. Sts. of N. J., pg. 275, sec. 45. This section was originally passed in the year , many years after the 68th section above recited was the law of the State.

The indictment against the said August Bergemann, whereon he was convicted, was as follows, to wit:

"Morris Oyer and Terminer and General Jail Delivery,

January Term, 1894.

Morris County, ss.

The Grand Inquest for the State of New Jersey, and for the body of the County of Morris, upon their oath present: That August Bergemann, otherwise called Charlie Bergemann, late of the ownship of Passaic, in the said County of Morris, on the nineteenth day of January, in the year of

our Lord one thousand eight hundred and ninety-four, with force and arms, at the township of Passaic aforesaid, in the County of Morris aforesaid, and within the jurisdiction of this Court, one Julius Bergemann, then and there being in the peace of God and of this State, did wilfully, feloniously and of his malice aforethought kill and murder, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

JOSHUA S. SALMON,
Prosecutor of the Pleas."

Art. 1, Sec. 8, of the Constitution of New Jersey says, "In all criminal prosecutions the accused shall have the right * * * to be informed of the nature and cause of the accusation." This language is verbatim the language of the United States Constitution which is claimed to be violated. Found in Art. VI. U. S. Const.

FIRST. *The indictment is sufficient and no objection was made to it before the trial Court.*

The case of Graves vs. State, 45 N. J. Law (16 Vr.) 203, ib. 347, was carried up to test the two questions: first, as to the constitutionality of Sec. 45 of the Crim. Proc. Act above given, and of the indictment under said section; and second, whether under such indictment a defendant could be convicted of murder in the first degree.

Both questions were there decided in favor of the law and the indictment first by the Supreme Court (pg. 203) and afterwards by the Court of Errors and Appeals (pg. 347). The Court said: "An indictment charging murder in the language

of the 45th Section of the Criminal Procedure Act is constitutional and legal"; and further: "No right of a defendant is violated nor any privilege of his disregarded or contravened by convicting him of murder in the first degree on an indictment which describes the crime, merely, according to the statutory form." And in referring to the 68th Sec. of the Crimes Act above given, the Court declared that that Section did not create any *new crime* but merely made a distinction with a view to a difference in the punishment between the most heinous and the less aggravated grades of the crime of murder.

The indictment in question is the same as the one in the Graves case and was copied after that.

"In an indictment for murder, when the fact that the killing was in the commission of a rape is relied on to make such killing murder in the first degree, a count in the general form authorized by the 45th Sec. of the Crim. Proc. Act is sufficient." Titus vs. State, 49 N. J., Law (20 Vr.) 36.

In many of the states having similar laws to the sections of the New Jersey statutes above given the Courts have held similar indictments to be good.

The statute of Colorado declares that it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased. Gen. Sts., Sec. 926.

The Court in the case of Jordan vs. People, 36 Pac., Rep. 218, held that the Act is not in conflict

with the Section of the Bill of Rights, providing that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation. Col. Const., Art. II., Sec. 16.

An indictment of the statutory form was held to be good in the case of Redus vs. People, 10 Col., 208. The question is fully and ably discussed in this case, and the words feloniously, wilfully and of his malice aforethought are there held to include the idea of deliberation and premeditation. See also Hill vs. People, 1 Col. 436—Chief Justice Kirkpatrick held the same idea in his definition of murder: he says "murder is the killing a reasonable being with malice aforethought, that is, with a *deliberate intention* or *formed design*" State vs. Zellers, 2 Halst. 243.

In California an indictment for murder which charged that defendants did feloniously and unlawfully and of their malice aforethought kill and murder John Ruhland contrary &c. was held good. People vs. Alviso, 55 Cali. 230. See also Weatherman vs. Commonwealth, Sup. Ct. of Appeals of Virginia, 19 S. E. Reptr. 778; Green vs. Commonwealth, 12 Allen, 155; Commonwealth vs. Gardner, 11 Gray 438; Commonwealth vs. Desmarteau, 16 Gray 1.

SECOND. *The form of an indictment is a matter of procedure and will be left wholly to the State Courts having jurisdiction of the cause and person.*

As to jurisdiction, Sec. 30 of the Criminal Procedure Act of N. J. says: "The Court of Over and Terminer and General Jail Delivery shall have cognizance of all crimes and offences whatsoever which by the law are or shall be of an indictable or presentable nature and which have been or shall be committed, done or attempted within the Coun-

ties respectively for which such Court shall be held", &c. Rev. Sts. of N. J. pg. 273, Sec. 30.

The jurisdiction, therefore, of the Court in which the Appellant was tried and convicted, cannot be questioned, and the form of the indictment should have been objected to and decided upon by that Court.

In the case of Caldwell vs. the State of Texas, which was before this Court in the October Term, 1890, the following was the form of the indictment, viz: "The Grand Jurors, &c., * * * upon their oath present in the District Court of the said County that William Caldwell, late of the County of Fort Bend, laborer, on or about the first day of August in the year of our Lord one Thousand Eight Hundred and eighty-eight, with force and arms in the said County of Fort Bend and State of Texas, did then and there unlawfully and with expressed malice aforethought, kill one J. N. Shamblin, by shooting him with a gun contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State."

His Honor, the Chief Justice, in delivering the opinion of the Court in that case, said: "By the 14th amendment the powers of the States in dealing with crime within their borders, are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law in its regular course of administration through Courts of Justice is due process, and when secured by the law of the State the constitutional requisition is satisfied.

"No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State Court is directed to the sufficiency of an indictment in the ordinary administration of

criminal laws, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to.

"The Constitution of Texas secured to him the right to demand the nature and cause of the accusation against him, and the State Court determined, as was its province, that this demand was satisfied by the indictment in question."

In Bank of Hamilton vs. Dudley, 2 Peters 524, it was contended that the exclusive powers of the State Courts to construe legislative acts did not extend to the paramount law so as to enable them to give efficacy to an act which was contrary to the State Constitution; but Marshal, C. J., said: "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. Story on the Const. 2 Vol. Sec., 1795 note. See also Elmendorf vs. Taylor, 10 Wheaton, 159.

In Green vs. Neal the Court said: "The decision of the highest judicial tribunal of a State should be considered as final by this Court, not because the State tribunal in such a case has any power to bind this Court, but because, in the language of the Court in Sheby vs. Guy, 11 Wheaton, 361, "a fixed and received construction by a State in its own Courts makes a part of the statute law."

In Jugiro vs. Brush, 11 Sup Ct. Reptr, 770, His Honor Justice Harlan, in delivering the opinion of the Court, said: "The misdescription in the indictment of the wound he was charged with having inflicted upon the deceased, and the exclusion from the list of grand and petit jurors of citizens of the United States of the same race with appellant, were

all matters occurring in the course of the proceedings and trial in a Court of competent jurisdiction proceeding under statutes that do not conflict with the Constitution of the United States."

"The errors, if any, committed by that Court in respect to any of those matters did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus*."

THIRD. *If the State Constitution or the statute under which the appellant was convicted is not repugnant to the Constitution of the United States the case cannot be brought to this Court by a writ of habeas corpus; it can only be by writ of error to the highest Court in the State.*

In re Wood, 140, U. S. 278, the Court says, "the question raised in this case could have been raised and determined by the trial Court in New York on a motion to set aside the indictment."

"The appellant should have made his objections to the indictment to the trial Court, and if overruled should have taken the question for decision to the highest Court to which a writ of error could be sued out from this Court; and failing to do so, he cannot have the adverse decision of the State Court reviewed by a Circuit Court of the U. S. upon a writ of *habeas corpus*."

"The only ground on which this Court or any Court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under a conviction and sentence of another Court is the want of jurisdiction in such Court over the person or the cause, or some other matter rendering its proceedings void." Exparte Siebold, 100, U. S. 371.

"It has often been reiterated in this Court that

the writ of *habeas corpus* cannot be converted into a writ of *error*, and that this Court when asked to issue a writ of *habeas corpus* as of its original jurisdiction can do so only when the inferior Court has acted without jurisdiction or has exceeded its powers to the prejudice of the party seeking relief." In re Lane, 135, U. S. 443.

"A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of *error*. If the Commissioner has jurisdiction of the subject matter and of the person of the accused * * * the decision of the Commissioner cannot be reviewed by a Circuit Court or by this Court on *habeas corpus* either originally or by appeal." In re Lewis Oteiza y Cortes 136, U. S. 330; see also in Exparte Frederich, 13, Sup. Ct.; Reptr. 793, and Pepke vs. Cronan 155, U. S. 100.

In the case now being considered the constitutionality of the law is not questioned. It is only claimed that under the form of the indictment the appellant could not be convicted of murder in the first degree. The appellant admits in his petition that the indictment charged murder in the second degree.

As to the allegation in appellant's petition that his conviction and the judgment of the Court thereon was in violation of the 14th amendment of the U. S. Constitution, I refer to the language of Mr. Justice Bradley in a case before this Court: "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is

nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws." Missouri vs. Lewis, 110 U. S. 533.

It therefore follows that his Honor, Judge Green, was right in refusing to grant the prayer of the appellant as set forth in his petition, because :

First. The Constitution and laws of New Jersey, so far as they pertain to the case in question, are not repugnant to the Constitution of the United States.

Second. The indictment under which the appellant was convicted is constitutional and legal.

Third. The form of an indictment in a State Court is a matter of procedure over which the State Courts alone have cognizance.

Fourth. The Court in which appellant was tried and convicted had jurisdiction over the crime and the person charged in the indictment.

Fifth. The jurisdiction of the State Court, over the crime and the person being established, the proceedings cannot be carried to a Federal Court by *habeas corpus*.

JOSHUA S. SALMON,
Attorney for Appellee.

Office Supreme Court, U.S.
FILED.
MAR 18 1895
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1894.

NO. 709.

AUGUST BERGEMAN,
Appellant.

vs.

EDMUND A. BACKER,
Appellee.

ON HABEAS CORPUS.

APPELLANT'S SUPPLEMENTARY BRIEF.

WILLIAM D. DALY,
THOMAS J. O'BRIEN,
JAMES J. FUREY,
Counsel for Appellant.

Sentinel Record Print, Summit, N. J.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1894.

No. 709.

AUGUST BERGEMAN, Appellant, AND EDMUND A. BACKER, Appellee.	Habeas Corpus.

Appellants Argument and Supplementary Brief.

May it please the Court:

IS A FEDERAL QUESTION PRESENTED ON THIS APPEAL?

Counsel for Appellant concede this to be the vital question at issue. We maintain the affirmative of that proposition, and also that our case comes squarely within the purview of the 709th section of the U. S. Judiciary Act The precise question raised is a new one, and if it is unshackled by precedent it ought to be decided here on principles. Concisely stated the grievances of Appellant are these viz.

That he stands convicted of a crime of a greater magnitude than is shown by the indictment in this, that by the law of New Jersey defining murder of the first degree, it is an essential ingredient that *premeditation* be affirmatively charged in the indictment. Such was not done in his case, nevertheless he stands convicted of murder of the first degree, while the indictment discloses no crime exceeding that of the second degree: the first degree carrying the death penalty, the second degree imprisonment.

That the presiding judge at the trial in his charge to the jury was guilty of a gross abuse of discretion, in saying to the jury that murder had been committed by Appellant and for which he was then on trial; to which charge and that part thereof, Appellant took a general and special exception and objection, which was allowed and yet remains part of said record undetermined by any Appellate Court.

That said alleged gross abuse of discretion tended to and did operate on the minds of the jury prejudicially to the Appellant and resulted in the finding of said verdict in the first degree.

That Appellant after said verdict endeavored to have reviewed in the highest Court of New Jersey, the said indictment in form and substance, and the verdict rendered therein also the right and authority, of said judge to charge the jury in manner aforesaid, which right has been and is yet denied Appellant, by the State of New Jersey.

That Appellant applied to the Chancellor of New Jersey, to grant him *ex mere gratia*, a writ of error to the Supreme Court of New Jersey to have reviewed the premises aforesaid and which was also denied by said Chancellor, after he assumed jurisdiction of such application and considered the same.

That by reason of the refusal and denial to Appellant of said writ of error either to the Supreme Court, or to the Court of Errors and Appeals of said State, the Appellee who is the Sheriff of the County, now holds his warrant from said Court of Oyer and Terminer to put Appellant to death.

That when justice was denied Appellant in manner and form aforesaid he claims that his said trial was not fair and impartial; further, in not having been informed in the indictment of the true nature of the accusation against him; and in being denied by the State of New Jersey of the equal protection of the laws within its jurisdiction, and about to be deprived of his life without due process of law; Appellant then applied for a writ of Habeas Corpus to the Circuit Judge of this Court, who also denied said application, and from which judgment Appellant has appealed and is now before this Court on this proceeding.

Therefore, the case of Appellant now stands or falls on the solution of the following questions of law.

1. Has a state legislature valid authority to enact a law, making writs of error in Capital cases, writs of right, grantable *ex debito justitiae*, and not *ex mera gratia* as at common law?

2. Where a State legislature duly exercises such a right, if the act has never been adjudged unconstitutional by proper authority and is yet operative will the denial of such a writ to a person sentenced to death, upon his application therefor, operate as the denial to him by the State, of the equal protection of the laws within its jurisdiction; and is such a refusal depriving the felon of his life without due process of law?

3. Where a person is indicted in a state court for felony, the indictment charging the crime of murder of the second degree, will a conviction of murder of the first degree be supported on such verdict?

4. *Is it due process of law* to permit and grant to defendant on a trial divers exceptions which being made part of the record were primarily granted for the sole and only object of having the judgment of an Appellate Court thereon, and simply because the verdict carried with it the death penalty to refuse a writ of error to have such exceptions reviewed and thus effectually cut him off from appealing to any court, but to subject the defendant to the sentence of death, passed on the verdict?

5. In such a case, and more especially when the judgment was not rendered in the highest court of the State, and no writ of error to be had from the Supreme Court of the United States, to cure such evil, has the Appellant the right to apply to this Court for its aid and intervention by Habeas Corpus to restrain the State Court from its erroneous action in the premises?

Before we proceed to marshal our decisions supporting our contentions, we respectfully ask our adversaries these questions:

On what authority does his Honor the Chancellor rely for his jurisdiction to make writs of error in capital cases, *ex mere gratia* and not *ex debito justitiae*?

We know the answer:

Because at common law, it was the prerogative of the King, to be excercised by him under his sign manual, or by the Attorney General of the Crown under his fiat. The felon could rarely have the benefit of it, but it was a writ of right to the heir, after a year, a day when the King then had his waste therefrom.

Then we ask:

When was that power lodged when the colonies became free and independent states?

Naturally, the reply will be:

The People the source of all power.

To that we give our assent, but ask further—

when such a power was merged in the people, as an entity, was it susceptible of being granted ever by legislation to one man, who in a republican form of government would be thus placed in dignity over all the Courts and who would thus be really but a reproduction of a King by another name, and from whose judgment there could be no appeal.

But, our adversary may reply, "It is a remnant of the Feudal law, engrafted upon and made a fixed principle of the law of England since the conquest by William of Normandy."

Granted; notwithstanding during the first six hundred years of such *Feudal law* as being part of the law of England, the same Kings endeavored to fasten on such fabric other parts of the Feudal law such as infallibility, apostolic succession and the divine right of Kings, to rule and govern though many of them were born out of wedlock. Yet since the Revolution under Cromwell to this time but one decision can be quoted verifying such right and that in the reign of Queen Anne (1704) Seventy-two years before our colonies determined to throw off all Kingly shackles and create their own nation on the principle that by nature every man is free and equal and inferentially at least negatived the claim that any one man should be invested with imperial dignity and have the right to say "By my grace you may have a writ of error" or "By my grace you shall not have a writ of error."

We admit that, after our national independence the legislature of the various states passed laws respecting the issuing of such writs making them *ex gratia* the reason for which will be hereafter explained. For the first nineteen years of the State of New Jersey, no such act was passed and indeed at this time it would be of historic interest to know who then had such authority. It is to be hoped no murders occurred within that time because it was not until 1846 that the legislature changed the crime

into degrees as it now stands. But in the year 1794 the great State of New York by statute, vested in its Chancellor such a right as the Chancellor of New Jersey now claims, and as the constitutions of New York and New Jersey were similar, the legislature of New Jersey copied the act of New York and except the jurisdictional part, made it the law of New Jersey. This was neighborly and enabled them to get the sense of, and the statute itself by the mere mechanical process of copying.

Counsel for Appellant contend that the passing of such legislation gave no force and vitality to the question, for as a matter of history, this country never adopted the Feudal law in its Federal or state relations. It must be noticed that on the passage of these acts the rules of the common law existed viz: forfeiture, corruption of blood, attainder and benefit of clergy. By the provisions of the United States Constitution, the States were required to repeal all State laws respecting attainder. Hence the reason for the rule ceased as the office of the writ at common law was to review the attainder, and not the conviction. Further it is contended that the Feudal law never existed in New Jersey, because on conviction the felon had no mesne or Superior Lord to whom was forfeited any estate. Therefore it being conceded that the subject matter was of statutory regulation, the legislature had the right to amend it. This was done by New Jersey, in 1878, following again the path made by the New York Legislature of 1855.

But this last statute has not met with the sanction of the Chancellor, of New Jersey. He ignores its positive command, and refuses to recognize it as being of force.

Tenaciously he clings to the shadows and semblance of the Kings and insists upon exercising the prerogative, that he (the Chancellor) is the only per-

son in the whole State, the statute notwithstanding, who has the right to say, "By my grace you shall not have the writ."

Exceptions taken on the record, and undetermined are thus cut off from appeal to any Forum and the anomaly is presented of a Court granting an exception to be heard by a higher tribunal, while one man asserts the uncontrollable authority not only to negative such consent of the trial Court but also to prevent the same.

If such actions be sound law then, was as well said in another case "It is more fitted for the Meridian of Constantinople than for a free State."

The peculiar jurisdiction thus claimed by the Chancellor of New Jersey is purely statutory, the statute being a literal rescript of one passed in New York State on Nov. 23 1784.

See Jones and Varricks Edition

Laws of N. Y. Sec 13 p. 183.

It was copied verbatim by the New Jersey legislature on March 6, 1795.

Laws of N. J. p. 186.

Upon this subject the Constitutions of N. Y. and N. J. were alike at that time the Governor of each State being the *ex-officio* Chancellor.

The Chancellor thus became vested with a judicial function in matters of this kind and as was determined "The judicial power given to the Chancellor over writs of error in capital cases is an affirmative pregnant."

People vs. Yates 6 Johns. N. Y. 366.

As a matter of fact such jurisdiction has never been attacked in any direct proceeding, and but one decision can be found touching upon the question (A. D. 1827.)

Lavitt vs. People 7 Cowen (N. Y.) 339.

That was a case where a writ of error was issued as of course without the fiat of the Attorney General and was dismissed.

The Legislature of New York after it adopted the code, instead of the Common law procedure, in 1855, again amended this Statute, by wholly taking such power from the Chancellor, and vesting the right of an appeal in capital cases in the Court of Errors and Appeals to take up the whole cause. Notwithstanding that a statute also gave leave to take a bill of exceptions on the trial of a capital case; to be reviewable before its Supreme Court, that statute was also repealed. The Court of Errors and Appeals, of New York fully confirmed that action of the legislature (A. D. 1888).

109 N. Y. 418.

In the year 1878 the legislature of New Jersey again followed New York, and made writs of error in Capital cases writs of right, and in this statute were as complaisant as the former legislature of 1795 by making it a literal copy.

Supp. to Rev. N. J. p. 210.

The first case brought under it, did not meet with the reception that the Court of Appeals of New York extended to their remedial legislation, but incontinently dismissed the writ.

The syllabus of the decision therein rendered is "A writ of error will not go directly from the Court of Errors to the Oyer and Terminer."

"The legislature cannot sanction such a proceeding, as it is one of the prerogatives of the Supreme Court to exercise, in the first instance in such cases."

State vs. Entries 18 Vroom N. J. 140.

This decision of State vs. Entries (ubi supra) is yet the law of New Jersey, and under which does his Honor the Chancellor claim jurisdiction, under the New York statute of 1784, afterwards adopted in New Jersey in 1795 and re-enacted in 1846 and 1875?

Jones and Varrick Laws of N. Y. 183.

N. J. Laws (W. Patterson) 186.

Nix. Dig. of N. J. 221.

Rev. of N. J. (1875) 283.

One of the judges of said Court of Errors of N. J. that promulgated the decision of *State vs. Entries* was Mr. Jonathan Dixon, who is the same jurist who presided at the trial of Appellant, and who allowed and granted the exception, which it is contended the Appellant cannot now have reviewed on account of the refusal of said writ of error.

Appellant is therefore prevented from issuing the writ under color of said statute, because he would then be obliged to apply to this same Judge Dixon for a stay of the execution of Appellant and, as he, the judge, has put himself upon record in said case of Entries Appellant cannot ask him to now stultify his decision as already expressed.

We therefore submit that we come before this Court on our application fortified by the law of New Jersey duly enacted, also the action of the New York legislature, and the Court of Errors and Appeals of New York, a Court in dignity and authority at least co-equal with that of the Court Errors of New Jersey.

This being so, can it be maintained that the policy of this Republic is that it will not interfere in the behalf of a citizen, innocent or guilty, whose claim is that he has been denied a right expressed with all the the sanction of a law, giving him an absolute right to a writ of error in a capital case, while a branch of its judiciary merely declines to comply with the commands of the legislature?

What efficacy then was there in the objections to the charge of the judge, and where can it be reviewable? ! !

On such a fiction of prerogative claimed by the Chancellor, can it be adjudged due process of law that a life may be sacrificed by a court of inferior jurisdiction at common law? For a court of Oyer and Terminer is of such a character

Quinlo Appo. vs. People

21 N. Y. 534.

As to our rights to apply for relief to this court by way of Habeas Corpus:

We have no other remedy. We cannot obtain a writ of error from the Supreme Court because the judgment is not rendered in the highest court of the State. We have no contention to make even against the State Court, if granted, simply the right of appeal, and which must exist, irrespective of statute; for to deny such right is so conclusively unconstitutional that no argument is needed to support it.

Ex Parte Watkins 3 Pet. 198.

Ex Parte Lees El, Bl, and El, 828.

We cite:

"Whenever a case has been passed to judgment in a State tribunal, if the defendant thinks he is imprisoned contrary to the Constitution of the United States, he should be put to his appeal to the highest court of his State in which the question is examinable, and then to a writ of error to the Supreme Court of the United States."

Article published in 18th Am. Law Rev. 23.

Bradley J. Ex Parte Bridges 2 Woods.

Harlan J. Ex Parte Royal, 110 U. S.

"The judge should refrain from comments that will tend to affect the result of the trial. He has no right to express an opinion of its effect.

State vs. Monroe 5 Ga. 85.

Lambert 23 Miss 322.

Crystallizing therefore all of Appellant's case: if the authority of the Chancellor be founded on the common law, and that at the time of the first jurisdiction vested in him, attainder, forfeiture, corruption of blood, benefit of clergy, and trial by battel was also part of the law of the State, and if by legislation all these old statutes were repealed, and more particularly the crime of Felony, as such is not as declared by any law of New Jersey, being devided into high crimes and misdemeanors, it may be well contested that such assumption of authority is not lawful but is repugnant to the law of the

land and on behalf of Appellant, we ask that he be remanded and his execution under sentence be stayed until he shall have the opportunity of having his case passed on by the highest court of his State according to the true intent and meaning of the Constitution of the United States, and by due process of law.

WILLIAM D. DALY,
Counsel for Appellant.